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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 754

LOUIS POLLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 515–523) is reported at 202 F. 2d 281.

JURISDICTION

The judgment of the Court of Appeals was entered February 27, 1953 (R. 523), and the petition for rehearing was denied March 30, 1953 (R. 529). The petition for a writ of certiorari was filed April 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was a variance between the indictment, which alleged an understatement of income computed on the calendar year basis, and the proof adduced by the Government.

2. Whether the evidence was sufficient to support the verdict.

3. Whether the trial court erred in requiring petitioner's attorney to produce certain papers over a claim of privilege.

4. Whether the trial court erred in refusing certain instructions.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

On April 13, 1951, an indictment in two counts was filed against petitioner in the United States District Court for the Northern District of Alabama. Count One charged petitioner with attempting, in violation of Section 145 (b) of the Internal Revenue Code, to evade a large part of the income tax owed by himself and his wife for the calendar year 1944 by filing a false return on March 15, 1945, in which he stated that their net income for the calendar year 1944 was $19,503.49 on which a tax of $6,267.35 was due, whereas he knew that their net income was $32,983.92 and that the tax due was $14,490.05. Count Two charged him with attempting to evade a large part of the tax for the calendar year 1945 by filing a false return on March 11, 1946, indicating a joint net income for the calendar year 1945 of $15,871.83 with a tax due in the amount of $4,436.04, whereas he knew that their net income was $38,208.87 and that the tax due was $17,987.55. (R. 1–3.) After a jury trial petitioner was found guilty as charged (R. 10), and on May 22, 1952, the District Court imposed

a general sentence of imprisonment for eighteen months and a fine of $1,000 (R. 10–12). The Court of Appeals affirmed (R. 515–523).

The evidence for the Government may briefly be summarized as follows:

On August 26, 1943, petitioner bought a jewelry store in Dothan, Alabama, which he operated as sole proprietor for the period involved in this case. (R. 191, 272, 284, 415.) His wife assisted in the management and he employed a staff of three to five salesladies. (R. 106, 233, 240.) The store handled a rather expensive line of jewelry and silver, the value of the diamonds running as high as $1,100. (R. 108, 235, 289.) The sales force was instructed to ring up small sales on the cash register, but when a sale was made for a price in excess of $150 it was not to be rung up and the proceeds were to be taken directly to petitioner or his wife.[1] Petitioner or his wife would usually take over these larger sales, complete the negotiations, and collect the proceeds. (R. 105–116, 233–235, 242–245, 247.) The bookkeeper, in making up her daily sales record, got her information from the cash register tally alone. (R. 249–253, 254–257.)

The accountants who made out petitioner's income tax returns for 1944 and 1945 used the books

[1] The Government introduced evidence of several specific unrecorded sales in large amounts. (R. 106–108, 114–115, 145, 148, 149, 151, 153, 234, 345–350.)

and the cash register tally to compute the gross income from the business. For 1944 the accountant was told to add $2,500 for unrecorded sales, and for 1945 he was told to add a similar item of $4,000. In neither instance was the accountant shown any records to substantiate the figure he was given. (R. 39–45, 53, 56–60, 183, 222, 223.)

In the absence of records for these sales the internal revenue agents began to check petitioner's income for the period involved by computing the annual increases in his net worth. (R. 268–289, 294–295, 298–299, 345, 434–435.) During the course of the investigation petitioner's accountant submitted a statement to the agents showing that, as of January 1, 1942, his net worth was $44,830.88, and that by December 31, 1945, it had increased to $112,073.23. To this increase in net worth ($67,242.35) the accountant added petitioner's living expenses, insurance premiums and income taxes paid, and computed petitioner's total net income for the calendar years 1942 to 1945, inclusive, to be $93,345.75. (R. 157–167, 177–180.) For the calendar year 1945 the accountant's computation showed petitioner's net income at $37,044.14. The accountant testified for the Government at the trial and stated that, as a result of certain large real estate transactions in Florida of which he had no notice at the time he prepared the statement, the 1945 income would have to be increased in his computation to

$57,044.14.[2] (R. 168–177, 184–186, 226–227.) Petitioner's income tax returns for the years covered by the accountant's computation reported the following net income (R. 21, 23, 167–168):

1942	$0.00
1943	8,035.00
1944	19,503.49
1945	15,871.83
Total	$43,410.32

Petitioner prepared his income tax return for 1942 on a calendar year basis, and he continued to file them on this basis through all the period involved in this case. (R. 26, 30–31, 34, 188, 191–199.) However, the accountant who prepared the return for 1944 was under the impression that the jewelry business was a partnership between petitioner and his son. He, therefore, computed petitioner's income from the business on a fiscal year basis, beginning August 26, 1943, the date the store was purchased, and ending July 31, 1944.[3] All other income he computed on the basis of the calendar year 1944. As a result the return reported business income

[2] The accountant's statement further showed that petitioner's net worth had increased to $140,826.59, as of December 31, 1946, and that his net income for the calendar year 1946 was $37,646.70. Petitioner's return for 1946 showed an income of only $11,575.68. (R. 215–216.)

[3] No income from the Dothan store had been included in petitioner's 1943 return. (R. 49, 374, 412.)

on a fiscal year basis and other income on a calendar year basis.[4] The same procedure was followed in 1945. (R. 41–42, 46–47, 50, 61–63, 156–157, 187–188.) By the time the 1946 return was filed the error had been discovered as the result of the revenue agent's investigation, and in that return both business income and other income were computed on the basis of the calendar year. (R. 198–201.)

In view of this confusion in petitioner's returns the Government furnished three different computations of his net income for the years 1944 and 1945:

1. Using petitioner's own basis of computation, *fiscal* year for the business and *calendar* year for all other sources, the Government computed his net income as follows:

1944	$24,205.98	(R. 325–332, 351–352)
1945	50,194.32	(R. 332–343)

2. On a *strictly calendar* year basis for both the jewelry business and all other income (R. 387, 392, 422), the Government computed petitioner's net income as follows:

1944	$20,518.55	(R. 426–428)
1945	48,709.91	(R. 428–429)

[4] This would have been proper if the business had been in fact a partnership. Internal Revenue Code, sec. 188 (26 U. S. C. 1946 ed., sec. 188).

3. On a *strictly fiscal* basis for both the business and other income the Government computed the net income as follows:

1944_____ $32,983.92 (R. 432)
1945_____ 38,208.87 (R. 432–433)

Petitioner did not take the stand and offered no witnesses in his own behalf. (R. 451.)

In his charge to the jury the trial judge explained the essential elements of the offense alleged in the indictment (R. 459–461), explained the method of proving understatement of income by showing annual increases in net worth (R. 461–463), and then specifically charged the jury that they must find that the Government had proven a willful understatement of income for the *calendar years* 1944 and 1945. This last portion of the instruction is as follows (R. 463–464):

> I further charge you, gentlemen of the jury, that while I have permitted the Government much latitude in an effort to establish the Defendant's net worth as of the beginning period, nevertheless, I specifically charge you that the Defendant is not on trial for any income tax violations for any years except 1944 and 1945, and if from the evidence, and the evidence alone, you are satisfied beyond a reasonable doubt that the Defendant did willfully and knowingly attempt to defeat and evade the income tax due and owing by him to the United States for the calendar years 1944 or 1945 by filing and causing to be

> filed with the Collector of Internal Revenue a false and fraudulent income tax return, then it would be your duty to bring in a verdict of guilty. And even should you be so reasonably satisfied that he had violated said law for any years other than 1944 and 1945, I state to you he is not being tried for any such violation, and his guilt or innocence must be determined from his taxable earnings and the reports filed thereon for the years 1944 or 1945, and not years prior nor subsequent thereto.

ARGUMENT

1. Petitioner contends (Pet. 1, 6–7, 11–12, 14–22) that the indictment, which alleged an understatement of income computed on a calendar year basis, is invalid because it appears from the evidence that the books of his business were kept on a fiscal year basis. The contention appears to be, in substance, that there is a variance between the indictment and the proof.

There can be no question as to the validity of the indictment itself. It clearly and unambiguously charges attempts to evade income taxes for the calendar years 1944 and 1945 by filing false returns understating net income for those calendar years. (R. 1–3.) Perhaps petitioner means to argue that there was no evidence before the grand jury sufficient to justify such an indictment since one of the computations presented by the revenue agent was made upon a combined fiscal

and calendar year basis. (Pet. 14–16.) But, as has been pointed out above (*supra,* p. 7), the agent also computed petitioner's net income upon a calendar year basis alone, and there is nothing in the record to indicate that evidence of this nature was not before the grand jury. It is well settled that the validity of an indictment is not affected by the insufficiency or impropriety of evidence before the grand jury, except in extreme instances to prevent clear injustice or abuse of judicial process. *Cox* v. *Vaught,* 52 F. 2d 562 (C. A. 10th); *McKinney* v. *United States,* 199 Fed. 25, 27–28 (C. A. 8th). Apparently petitioner's real argument is that there is a variance between the indictment, which charges evasion of income taxes on a calendar year basis, and the proof, which includes the computation upon a combined calendar and fiscal basis and which shows that the books of the jewelry business were kept on a purely fiscal basis. Petitioner seems to argue that he was justified in his mistaken method of keeping his books and filing his returns because he followed the advice of his accountants.

The simple answer is that the Government proved, as it alleged in the indictment, that there was a gross understatement of net income upon a *strictly calendar* year basis (R. 387, 392, 420, 426–432), and it was left to the jury under proper instructions (R. 459–466) to determine whether this understatement was a wilful and intentional attempt to evade payment of income taxes for

the calendar years 1944 and 1945. Petitioner could not legally report his income on a fiscal basis, since the jewelry business was a sole proprietorship and not a partnership, and since his returns in 1942 and 1943 had been made upon a calendar year basis and he had not obtained the approval of the Commissioner of Internal Revenue to make a change.[5] (R. 50, 394.) Whether this was an honest mistake, and whether it led to an unintentional understatement of net income, were questions to be determined by the jury. However, since the 1944 and 1945 returns were actually filed on a combined fiscal and calendar year basis,[6] it was proper for the Government, in proving willful intent to evade, to show that even on the improper basis adopted in those returns there was a very large understatement of net income.

2. It is contended (Pet. 5, 9–10, 12, 28–31) that the Government's evidence of understatement of net income was insufficient to take the case to the jury. Petitioner's returns reported net income of $19,503.49 for 1944, and $15,871.83 for 1945. His accountant, McDaniel, computing in-

[5] Internal Revenue Code, Sec. 46 (26 U. S. C. 1946 ed., Sec. 46). In the cases cited by petitioner (Pet. 17–20) the taxpayers were properly keeping their books on a fiscal year basis.

[6] The present petition gives the impression that petitioner reported *all* his income on a fiscal year basis. (Pet. 14.) But, while the returns for 1944 and 1945 included fiscal income from the jewelry business, other income was computed on the basis of the calendar year. (R. 61–63.)

come for the calendar years by determining increases in net worth and adding non-deductible expenditures, testified that petitioner's net income was only $10,983.48 in 1944 (R. 169–170), but that it was $57,044.14 for 1945 (R. 170–177). The revenue agent, Martin, submitted three computations. He testified that computed on a strictly calendar year basis petitioner's net income was $20,518.55 in 1944, and $48,709.91 in 1945 (*supra*, p. 7). Petitioner's argument, which discusses only one-half of McDaniel's computation, and only one-third of Martin's, is patently frivolous. Any doubt as to the substantiality of the evidence for 1944 is of no moment, in view of the fact that a general sentence was imposed which is well within the maximum permissible under the 1945 count. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642; cf. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105.

3. During the trial, Milton Weiss, an attorney who had represented appellant in some real estate transactions in Florida, testified for the Government and, over objection, produced copies of two receipts in which he acknowledged that petitioner had delivered to him $11,500 and $10,000 in currency. (R. 124–127.) Petitioner contends (Pet. 5–6, 10–11, 12, 31–33) that this was a violation of a privileged communication between attorney and client. The argument is without merit.

It is clear from the record (R. 117–139) that these large sums of currency were being delivered to the attorney simply to enable him to make payments on real estate purchased by petitioner. It is clear also that the jury might well have considered these large cash transactions as evidence of a scheme by petitioner to evade the payment of his income tax. The privilege accorded to the attorney-client relationship applies only where the attorney is consulted in his professional capacity for the purpose of obtaining legal advice. Where the attorney is a mere scrivener, simply acting as would a banker or broker in an ordinary business transaction, the communication is not privileged. *Grant* v. *United States,* 227 U. S. 74; *United States* v. *DeVasto,* 52 F. 2d 26 (C. A. 2d), certiorari denied, 284 U. S. 678; *United States* v. *Vehicular Parking,* 52 F. Supp. 751 (D. Del.); *Chapman* v. *Peebles,* 84 Ala. 283. Furthermore, a communication made in furtherance of the offense for which the defendant is being tried is not privileged. *Clark* v. *United States,* 289 U. S. 1, 15; *Alexander* v. *United States,* 138 U. S. 353, 360; *United States* v. *DeVasto, supra.*

4. Petitioner contends (Pet. 4–5, 8–9, 12, 22–28) that the trial court erred in refusing to give three specific requested instructions. Two of these directed the jury to acquit petitioner if they found that the Government had included in its computa-

tion of taxable income for one calendar year income which had actually been paid to him in another calendar year. The other instructed them that the Government was without authority to compute his income tax on a calendar year basis, if he regularly kept his books on a fiscal year basis though filing calendar year returns.

The impropriety of these requested instructions has already been demonstrated. As to the first two, the Government had shown upon a strictly calendar year computation that there had been a large understatement of net income (*supra,* p. 7), and the jury were clearly instructed that petitioner's guilt must be determined upon the basis of his taxable earnings for the calendar years alone (*supra,* p. 8). It was not requested that the jury be instructed to limit their consideration of the Government's other computation on the combined calendar-fiscal basis to the issue of wilfulness alone. As to the third, there is no basis in the record for such an instruction. Petitioner had always filed his returns on a calendar year basis and had not obtained the approval of the Commissioner to file fiscal returns. Moreover, the fiscal operation of the jewelry business was a mistake, since there was no partnership between petitioner and his son as the accountants had originally been given to believe. Under any theory of the evidence the proper method of computation of petitioner's taxable income was on the basis of the calendar year.

The proposed instructions were improper in the light of the record, and the charge as given correctly states the applicable law.[7]

CONCLUSION

The decision below is clearly correct, and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1953.

[7] It is unnecessary to consider petitioner's contention (Pet. 6, 11, 12, 33–43) that the 1944 count was barred by the statute of limitations since the general sentence imposed was within the maximum allowable under the 1945 count. *Pinkerton* v. *United States*, *supra*; *Hirabayashi* v. *United States*, *supra*.

U. S. GOVERNMENT PRINTING OFFICE: 1953